IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-483

JAMES U. RUPPERT,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

JOHN F. HOLCOMB
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO
310 Rentschler Building
Hamilton, Ohio 45011
Telephone (513) 867-5722

DANIEL G. EICHEL
ASSISTANT PROSECUTING ATTORNEY

Attorneys for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-483

JAMES U. RUPPERT,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

QUESTIONS PRESENTED

Should certiorari be granted for the purpose of reviewing the Ohio Supreme Court's determination (1) that a statute authorizing trial in a capital offense by a three-judge panel and permitting findings to be made in the guilt phase by a majority vote was in effect; (2) that provision for a majority verdict by a three-judge panel does not offend the due process clause; and (3) that provision for a majority verdict of a three-judge panel does not violate the equal protection clause of the Fourteenth Amendment?

REASONS WHY CERTIORARI SHOULD BE DENIED

The State of Ohio, responding, disagrees substantially with Petitioner Ruppert's statement of facts, as the record of proceedings below would justify, but a recount of the facts in detail is not relevant to the legal issues presented herein. (Stevens, J., dissenting in *Dobbert* v. *Florida*, 432 U.S. 282, fn. 1 at 304 (1977).)

Petitioner Ruppert was found guilty by a majority of the three-judge panel which heard the merits of his case, one judge dissenting. Such a judgment of conviction was determined by the Courts below to be authorized under Ohio Revised Code Section 2945.06, which provides, in part:

> In any case in which a defendant waives his right to a trial by jury and elects to be tried by the court. . . . If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges. . . . Such judges or a *majority* of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly. (Emphasis added.)

This Section, clear on its face, stands intact after the Ohio Criminal Code revision in 1974, despite Petitioner's claims to the contrary. Petitioner urges all the reasoning, based on theories of statutory construction, which led his attorneys (who remain identical through trial, appeal and on this petition) to advise him that unanimity was required of a three-judge panel in the guilt phase of a capital, aggravated murder trial. (See Petition of the State of Ohio, Case No. 78-254.)

However, as determined by the Supreme Court of Ohio, Ohio Revised Code Section 2945.06 provisions for three-judge panel trial of capital cases, and for majority verdicts in the guilt phase of such trials, were jurisdictional and

were reconciled with Ohio Revised Code Section 2929.03 (E), which required unanimity of the panel in the death penalty imposition, thus indicating no "repeal by implication." *State* v. *Ruppert,* 54 Ohio St. 2d 263, 267-270, 375 N.E. 2d 1250, 1253-1254 (1978). This Court cannot alter, nor is it required to guage the wisdom of the legislature of Ohio as determined by the Supreme Court of Ohio. The statutory construction of the state's highest court fixes the meaning of the statute for this case; *Winters* v. *New York,* 333 U.S. 507 (1948).

The second theory contended by Petitioner is that the provision for majority verdict in the guilt phase of a three-judge panel trial violates the due process clause. While Petitioner's argument is quite vague, it is apparently that the existence of one dissenting vote would "negate proof beyond a reasonable doubt." (Petition at 11.)

This due process argument has been repeatedly rejected, by the Supreme Court of Ohio in the decision below and in *State* v. *Robbins,* 176 Ohio St. 362, 199 N.E. 742 (1964), and by this Court in *Johnson* v. *Louisiana,* 406 U.S. 356 (1972) and *Apodaca* v. *Oregon,* 406 U.S. 404 (1972). In *Johnson,* the defendant was tried before a twelve-man jury and convicted by a nine-to-three verdict, as authorized by Louisiana law. Appellant Johnson argued that the due process clause must be construed to require a unanimous jury verdict in all criminal cases in order to give substance to the reasonable doubt standard under the due process clause of the Fourteenth Amendment. This Court rejected that argument, taking the view that "the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." Noting at the outset that the Court has never held jury unanimity to be a requisite of due process of law, the Court held that less than unanimous jury

verdicts in criminal cases may satisfy the reasonable doubt standard:

> [W]e can find no basis for a holding that the nine jurors who voted for [Johnson's] conviction failed to follow their instructions concerning the need for proof beyond such a doubt or that the vote of any one of the nine failed to reflect an honest belief that guilt had been so proved. . . . We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion and render a verdict. On the contrary, it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. . . . [B]efore we alter our own long-standing perceptions about jury behavior and overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions. 406 U.S. at 361-362.

The above conclusions as to jury behavior apply equally to the behavior of a panel of judges as to their reasoning, argument, discussion and decision. This Court has no grounds to believe that a majority of a three-judge panel, aware of their responsibility and power over the liberty of the defendant, would ignore a fellow judge presenting reasoned argument in favor of acquittal. "A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose — when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position." 406 U.S. at 361.

Further, the Court rejected Johnson's argument that lack of jury unanimity was indicative of the existence of a rea-

sonable doubt. As did the Ohio court in its *Robbins* opinion, the *Johnson* Court stated that jury verdicts are regularly sustained even though appellate judges are closely divided on the issue whether there was sufficient evidence to support a conviction and, further, although the federal rule provides for unanimity of juries, where a federal jury cannot agree unanimously upon a verdict, the defendant is not acquitted, but is merely given a new trial. This reasoning, also applied in the companion case of *Apodaca* v. *Oregon, supra,* establishes that proof beyond a reasonable doubt is a subjective individual standard rather than a group standard, and that majority verdicts do not violate the due process clause. Moreover, while the Court in *Johnson* and *Apodaca* dealt with the essentials of a jury trial under Sixth and Fourteenth Amendments, such concerns are absent in the present case, a non-jury procedure.

Petitioner Ruppert seeks to distinguish the *Apodaca, Johnson,* and *Robbins* decisions because they were non-capital cases as opposed to capital cases. Taking this argument at its dubious face value, it is readily seen that Ohio law had *already* accommodated this distinction by providing that the decision to impose a death sentence must be unanimous, by Ohio Revised Code 2929.03 (E). Thus, by virtue of a majority verdict rendered in accord with 2945.-06, and the resultant sentence of life imprisonment by only two of the three judges, Ruppert's case is not a death case. Since a non-unanimous panel cannot by Ohio law impose the death penalty, and since Petitioner Ruppert was not so sentenced, he cannot complain of alleged burdens which do not attach to his conviction. *Dobbert* v. *Florida,* 432 U.S. 282, 300-301 (1977). Further, such argument would ultimately be moot in view of this Court's rulings in *Lockett* v. *Ohio,* 438 U.S. ——, 57 L.Ed. 2d 973 (1978) and *Bell* v. *Ohio,* 438 U.S. ——, 57 L.Ed. 2d 1010 (1978), as well as

the fact that the Ohio procedure itself precluded the death penalty.

Finally on this issue, Petitioner's reliance on *Johnson* v. *Louisiana, supra,* as stating this Court's position on required unanimity in a capital case, is wholly misplaced. The state of Georgia advanced the same mistaken hypothesis in *Ballew* v. *Georgia,* 435 U.S. 223 (1978), falsely stating that this Court had impliedly approved a 5-man jury in that case. The Court in *Ballew* corrected the mistaken argument, and explained that the 5-member jury (as well as the unanimous 12-man capital jury) of Louisiana had been examined only in connection with Johnson's claim of denial of equal protection.

Third, Petitioner Ruppert attacks as violative of the equal protection clause the provisions of Ohio law requiring unanimous jury verdicts, but permitting a three-judge panel to reach a majority decision and judgment. However, as seen by the foregoing argument, it is clear that both the jury system and the three-judge panel system provide means for criminal fact-finding which are equally consistent with due process of law. Further, the provision of Section 2945.06 that "such judges or a majority of them may decide all questions of fact and law arising upon the trial" serves a rational purpose, to facilitate, expedite, and reduce expense in the administration of justice. *Johnson* v. *Louisiana,* 406 U.S. at 364. The very purpose of Section 2945.06 is that, while providing the accused in a capital case with a special, appellate-like procedure to call forth the efforts of three judges rather than only one, the legislature also sought to vest in the three-judge court a jurisdiction like that found in every Ohio Court of Appeals. Authority is expressly conferred on a majority of the Court of Appeals to act upon all questions of law and fact, excepting only the reversal on the weight of the evi-

dence of a judgment "entered on the verdict of a jury" which requires the concurrence of all three judges. *State* v. *Gilkerson,* 1 Ohio St. 2d 103, 205 N.E. 2d 13 (1965). Likewise, the three-judge court under 2945.06 is authorized to act either unanimously or by a majority upon all questions of law and fact, except for the imposition of the death penalty under 2929.03, which requires the concurrence of all three judges.

Paradoxically, it is Ruppert's position that unanimity equivalent to jury procedure is required of a three-judge panel; thus, as a hung jury and retrial occurs upon a majority vote for acquittal by a jury, Petitioner's position must be that a two-to-one majority court finding for acquittal would also result in retrial. We presume, however, that Petitioner would not complaint if he were *acquitted* by the vote of two, with one judge convinced of his guilt beyond a reasonable doubt.

Beyond all of the foregoing arguments, the claim of a violation of equal protection must fail because the statutory scheme furnishes a choice for defendant.

> Presumably, if no choice were offered, coercion would not be alleged by appellant. We see nothing unreasonable or coercive in the statute: there are pros and cons with respect to each alternative. If a defendant feels uncomfortable with a jury as the trier of fact at trial and the trial judge as the trier of fact at the mitigation hearing, then he may elect a three-judge panel as the trier of fact for all of the proceedings. We see nothing objectionable in providing the defendant with a choice, absent, of course, an allegation of ineffective trial counsel. No such allegation was here made. *State* v. *Bell,* 48 Ohio St. 2d 270, 276, 358 N.E. 2d 556 (1976), (reversed on other grounds, *Bell* v. *Ohio, supra*) (1978).

There is "nothing irrational" about Ohio's decision to permit majority verdicts by two judges in the guilt stage of a three-judge court, while permitting verdicts by one judge alone in trials of non-capital offenses where jury waiver is made. *Cf. Dobbert* v. *Florida*, 432 U.S. 282, 301 (1977).

CONCLUSION

Petitioner Ruppert's application for certiorari should be denied.

Respectfully submitted,

JOHN F. HOLCOMB
Prosecuting Attorney
Butler County, Ohio

DANIEL G. EICHEL
Assistant Prosecuting Attorney
Butler County, Ohio

Attorneys for Respondent
310 Rentschler Building
Hamilton, Ohio 45011
Telephone: (513) 867-5722